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September 13, 2013

BY ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: MB Docket No. 12-108

Dear Ms. Dortch:

On September 12, 2013, Tillman Lay of Spiegel & McDiarmid LLP, counsel for the Alliance for Communications Democracy, Kevin McCarty, Assistant Executive of the United States Conference of Mayors, and the undersigned in my role as counsel for Montgomery County, Maryland, and the City of Boston, Massachusetts, met with the legal advisors listed below to discuss the importance of the Commission's implementation of Sections 204 and 205 of the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA").

Legal Advisor

Sarah Whitesell, Legal Advisor
Brendan Murray, Media Bureau Liason

Matthew Berry, Chief of Staff

Priscilla Delgado Argeris, Legal Advisor

Commissioner Office

Acting Chair Clyburn

Commissioner Pai

Commissioner Rosenworcel

Our conversations focused on the Commission's legal authority to require the depiction of individual program information on public, educational, and government ("PEG") access channels in the electronic program guides (EPGs) of all multichannel video program distributors (MVPDs) that carry PEG access channels. We also described the unique barriers to the visually impaired imposed by AT&T's U-verse "PEG product," and why those barriers are inconsistent with the CVAA. In addition, we shared with the Commission staff highlights from several of the comments filed in the docket documenting the unique programming that PEG offers to the

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September 13, 2013

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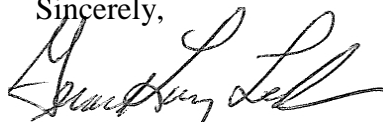
disabled and the need for Commission action to enable the visually impaired to have meaningful real-time access to PEG channel programming.

Our presentation followed the attached handouts that were provided to each of the Legal Advisors. These four handouts address:

- Legal Authority of the Commission to act.
- Research on the increasingly important role that EPGs play in consumer choice and viewer decisionmaking, as well as summarizing the large quantities of PEG programming produced by, or specifically for, persons with disabilities. This second handout also summarizes evidence in the record demonstrating that meaningful programming description information is being provided on EPGs for virtually all channels except PEG channels. Most MVPDs' EPGs do not provide meaningful programming description information for local PEG programming, even though those channels are the ones most likely to carry programming produced by, or of interest to, persons with disabilities.
- Visual evidence comparing how the programming of New York City's boroughs PEG channels is depicted on Verizon's EPG versus how that programming information is depicted on the EPG of Time Warner Cable of NYC.
- The Keep Us Connected Presentation on the unique problems that AT&T's U-verse PEG Product poses for the visually impaired and other subscribers' access to PEG channel programming. This handout highlights issues that are also before the Commission in Docket No. 09-13, but are also directly implicated by the relief the parties seek in this docket.

Please direct any questions to the undersigned.

Sincerely,



Gerard Lavery Lederer
for BEST BEST & KRIEGER LLP

cc: Sarah Whitesell
Brendan Murray
Matthew Berry
Priscilla Delgado Argeris

Attachment 1

***Commission Authority To Require MVPDs to Provide Programming Description Information
on Video Programming Guides (VPGs) Pursuant to the Twenty-First Century
Communications and Video Accessibility Act of 2010 (CVAA)***

Question Posed in this NPRM: “Does Section 205 provide us authority to require that MVPDs provide programming description information in programming guides for local programs and channels for the purpose of promoting accessibility?” (NPRM, para. 36)

Response: Yes, Section 205 provides the Commission with direct statutory authority to require MVPDs to provide programming description information in programming guides for *all channels*, including local programs and channels, for the purpose of promoting accessibility. The Commission may also exercise its ancillary authority to establish this requirement.

Scope of Proposed Requirement: MVPDs who choose to provide a video programming guide to subscribers should be required to provide, for all video programming channels on their video programming guide, a minimum level of information consisting of the channel name, the program name, program description, and symbols identifying the accessibility options for the program (“Programming Description Information”).

Legal Authority to Impose the Requirement to Provide Programming Description Information

1. The Commission Has Specific Authority to Adopt Mandatory Rules to Make Video Programming Guides “Audibly Accessible in Real-Time”

- With the passage of the CVAA, Congress has recognized that video programming guides are an integral part of enjoying video service which regularly makes hundreds of channels available to subscribers and has decided that user interfaces and video programming guides and menus are essential to making video programming services accessible.
- The CVAA gives the Commission direct and specific responsibility to make video programming guides accessible. Section 205 of the CVAA directs the Commission to “require” on-screen text menus and video programming guides used “for the display or selection of multichannel video programming” are “audibly accessible in real-time.”
- As the Commission and Congress have previously recognized with respect to closed captioning requirements, only mandatory rules can ensure that all Americans will have access.¹

¹ *In the Matter of Closed Captioning and Video Description of Video Programming Implementation of Section 305 of the Telecommunications Act of 1996 Video Programming Accessibility*, 11 FCC Rcd 19214, 19216 (FCC 1996) (“The legislative history of this section states that it is Congress’ goal ‘to ensure that all Americans ultimately have access to video services and programs particularly as video programming becomes an increasingly important part of the home, school and workplace.’ The House Committee recognized that there has been a significant increase in the amount of video programming that includes

2. The Commission has Authority as An Expert Agency to Define Ambiguous Terms in the CVAA

- The Commission has broad authority to use its expertise to interpret ambiguous terms in a statute, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).
- The CVAA does not define the key terms such as “on-screen text menus and guides provided by navigation devices...for the display and selection of multichannel video programming.”
- The VPAAC Report noted that on-screen guides and menus used to browse available A/V content can take many different forms and that the amount of program information provided can vary widely in level of detail.
- Although many user interfaces, guides and menus include channel names and high level program descriptions or titles, they do not always do so on a consistent basis for all channels, and MVPDs are not required to provide this information on their guides. As a result, the variability in the level of detail noted by the VPAAC exists, and in some instances the MVPD provides no program or channel information at all.
- It would be well within the Commission’s authority to address ambiguities in the terms employed by the statute by defining what these terms mean. For example, it would be reasonable, in light of the varying level of detail provided on guides, to define the video programming guides referred to in Section 205 to include the minimum level Programming Description Information needed to ensure accessibility to the guides is meaningful.

3. Adopting Rules Requiring MVPDs to Provide Programming Description Information on their video programming guides is Consistent the VPAAC Report

- The Commission has a Congressional mandate to implement the CVAA based on the expert advice and recommendations of its advisory committee (the VPAAC) and the community of users that depend on these video accessibility functions.
- Section 201(e)(2)(H) of the CVAA required the VPAAC to develop and submit a report that included “a recommendation for the standards, protocols, and procedures used to enable video programming information and selection provided by means of a navigation device, guide, or menu to be accessible in real-time by individuals who are blind or visually impaired.”
- The VPAAC Report (at 8) recommended a set of functions “considered essential to the video consumption experience,” and these included both “Channel / Program Selection” and “Display Channel / Program Information.”

closed captioning since the passage of the Television Decoder Circuitry Act of 1990 (“TDCA”). Nevertheless, the House Committee expressed a concern that video programming through all delivery systems should be accessible to persons with disabilities.”) (citations omitted)

- The VPAAC Report (at 11) suggested that to alleviate users' frustration over the inability to locate and select video programming that meets their accessibility needs prior to viewing clear identification information about accessibility could be included by "labeling the program as having captions and/or video description within the mechanism used to display channel/program information."
- The VPAAC Report (at 19) proposed that a universal symbol be used to identify the control mechanism for closed captioning.

4. Requiring MVPDs to Provide Programming Description Information Is Consistent with the Commission's Existing Definition of "Accessible" Developed for Accessibility Purposes

- Section 205 requires video programming guides to be "audibly ***accessible in real-time***".
- 47 C.F.R. § 6.3(a)(2) defines "accessible" to include "[a]ll information ***necessary*** to operate and use the product, including but not limited to, ***text***, static or dynamic images, ***icons***, ***labels***, sounds, or incidental operating cues" be available in visual and in auditory form (emphasis added).
- Programming Description Information consists of ***text, icons and labels*** which are ***necessary*** for users with disabilities to operate and use video programming guides in real-time.

5. The Commission May Exercise Its Ancillary Authority to Fully Achieve the Objectives of the CVAA and Meaningfully Carry Out Its Accessibility Responsibilities

- Even if the Commission were to take the view that the CVAA does not give it sufficient *direct* jurisdiction to impose the requirement to provide Programming Description Information on VPGs, it is well within the Commission's *ancillary* jurisdiction to impose the requirement. Jurisdiction may be asserted by the Commission when it is "reasonably ancillary to the effective performance of [its] various responsibilities." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).
- The Commission has previously exercised its ancillary authority to adopt rules for accessibility requirements – including among the accessibility requirements for telecommunications services required by 47 USC § 255, accessibility requirements for two non-telecommunications services (voicemail and interactive menus), 47 CFR Part 7.
- The Commission exercised its ancillary authority to include two non-telecommunications services that were "critical to making telecommunications accessible and usable by people with disabilities"² and "so integral to the use of telecommunications services today that, if inaccessible and unusable, the underlying

² *In the Matter of Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities* (WT Docket No. 96-198) Report And Order And Further Notice Of Inquiry, 16 FCC Rcd 6417, 6455 (1999), ¶ 93.

telecommunications services that sections 255 and 251(a)(2) have sought to make available will not be accessible to persons with disabilities in a meaningful way.”³

- The Commission concluded it could not “carry out meaningfully the accessibility requirements”⁴ or “fully achieve that objective without this limited use of [its] ancillary jurisdiction.”⁵
- The Commission used its discretion “so as to ensure that the implementation of section 255 is not thwarted,”⁶ based on its view that “inaccessible and unusable voicemail and interactive menus operate in a manner that can render the telecommunications service itself inaccessible and unusable.”⁷
- In the course of exercising its ancillary jurisdiction, the Commission defined the term “interactive menu” in 47 CFR § 7.3(e).
- More recently, in 2007, the Commission again exercised its ancillary authority to extend the same telecommunications accessibility requirements (including voicemail and interactive menus) to voice over internet protocol (VOIP) services.⁸

6. The general language in 47 USC § 544(f)(1) does not limit the Commission’s specific authority to implement the CVAA

- NCTA is wrong to suggest Section 205 of the CVAA only permits the Commission to make rules to make information accessible “that *already* is provided in on-screen text menus and guides.”⁹
- Congress not only enacted the CVAA specifically to address the accessibility of video programming guides, but it authorized the Commission to develop the necessary rules.
- The leading provider of guide data, Rovi Corporation, has previously told the Commission that guide data is only a small component of video programming service. In comments filed with the Commission in another proceeding three years ago, Rovi stated, “while the guide data is a significant component of the guide service, it is just

³ 16 FCC Rcd at 6458, ¶ 100.

⁴ *Id.*

⁵ *Id.*

⁶ 16 FCC Rcd at 6460, ¶ 103.

⁷ 16 FCC Rcd at 6461, ¶ 107.

⁸ *In the Matters of IP-Enabled Services; Implementation of Sections 255 and 251(a)(2) of The Communications Act of 1934, as Enacted by The Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, WC Docket No. 04-36; WT Docket No. 96-198; CG Docket No. 03-123; CC Docket No. 92-105, Report and Order, 22 FCC Rcd 11275 (2007).

⁹ *In the Matter of Accessibility of User Interfaces, and Video Programming Guides and Menus*, MB Docket No. 12-108, Comments of the National Cable & Telecommunications Association (filed July 15, 2013) at 11-12 (“NCTA Comments”).

one of several components that contribute to the value of the guide service as a whole, and the guide service is one of several components that contribute to the value of the video programming service as a whole, for which consumers are willing to pay a fee.”¹⁰

- Requiring Programming Description Information to appear on MVPDs’ video programming guides not only ensures the accessibility objective of the CVAA is fulfilled, it is, at most, an *incidental and minimal* programming guide requirement.¹¹

¹⁰ *In the Matter of Video Device Competition; Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, Reply Comments of Rovi Corporation (filed Aug. 12, 2010) at 2.

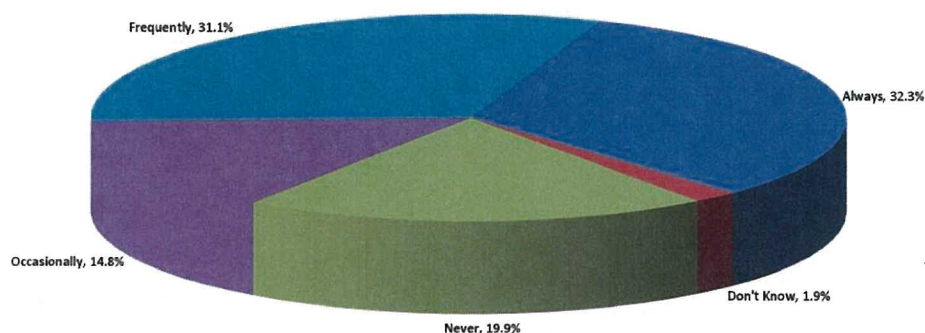
¹¹ In contrast, see *Motion Picture Ass’n of Am. v. FCC*, 309 F.3d 796, 803 (D.C. Cir. 2002) (“Video description is not a regulation of television transmission that only incidentally and minimally affects program content; it is a direct and significant regulation of program content. The rules require programmers to create a second script.”). In that case, the Commission was found to lack authority under Section 1, 47 USC § 151, to enact video description regulations. Following that ruling, Congress acted to include in the CVAA specific authority to reinstate the video description rules as well as authority to develop other rules necessary to address the accessibility of programming guides.

Attachment 2

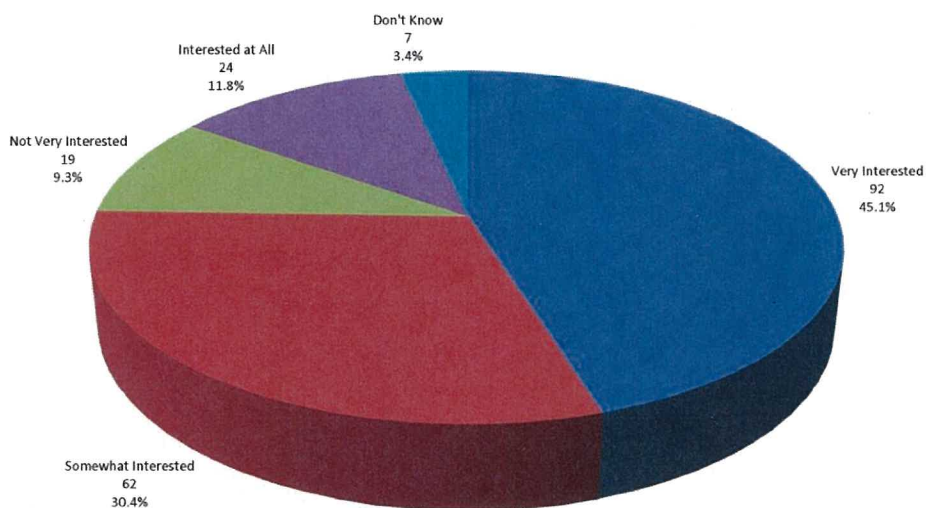
**THERE IS A DEMONSTRABLE NEED FOR A RULE REQUIRING MVPDs
TO PROVIDE PROGRAMMING DESCRIPTION INFORMATION
FOR ALL CHANNELS ON VIDEO PROGRAMMING GUIDES**

1. Video programming guides are the "go to" method for seeing what's on. Consumers don't surf channels, they surf the video programming guide.

- **63.4 PERCENT** of current cable subscribers in Montgomery County, MD recently surveyed stated that they **always or frequently** use the on-screen program guide to decide what to watch.¹



- **75.5 PERCENT** of Montgomery County, MD residents recently surveyed stated that they **were very interested or somewhat interested** in on-screen schedule of local programs.²



¹ Telephone survey conducted between May 2 and May 16, 2012 by Group W for Montgomery County. 600 interviews of current and former (within 3 years of interview date) Comcast subscribers were completed from randomly selected residential and cellular telephones. The survey has a margin of error of 4 percent and a 95 percent level of confidence.

² Telephone survey conducted between May 16 and May 23, 2012 by Group W for Montgomery County. 600 interviews were completed from randomly selected residential and cellular telephones. The survey has a margin of error of 4 percent and a 95 percent level of confidence.

2. Uncontroverted evidence in the record demonstrates that meaningful programming description information is not being provided on video programming guides for all channels

- The record contains at least 77 filings representing more than 250 local channels located in communities large and small in 23 different states (Arizona, California, Colorado, Connecticut, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Vermont, Virginia, Washington, Wisconsin).
- These filers reported on the practices of about half of the top 25 MVPDs (AT&T, Charter, Comcast, Cox Communications, Frontier, MetroCast, Midcontinent Communications, RCN, Suddenlink, Time Warner Cable, Verizon and WideOpenWest Networks).
- In most cases, their MVPDs label the local channels on their video programming guides using generic names that do not convey any meaningful information to the viewer necessary to provide the accessibility envisioned by the CVAA. These are names like:
 - “public access programming”
 - “government access”
 - “no programming details”
 - “customer information”
 - “local programming”
 - “LOCL”
 - “EDUC”
 - “GOVT”
 - “government meeting”
 - “educational programming”
 - “municipal access”
- In many cases, the local channels asked their MVPD to include programming description information for the local channels on their video programming guide and the MVPD refused to do so.

3. Uncontroverted evidence in the record demonstrates that video programming guides do not provide meaningful programming description information for programming with accessibility features or for local programming produced by or of interest to persons with disabilities

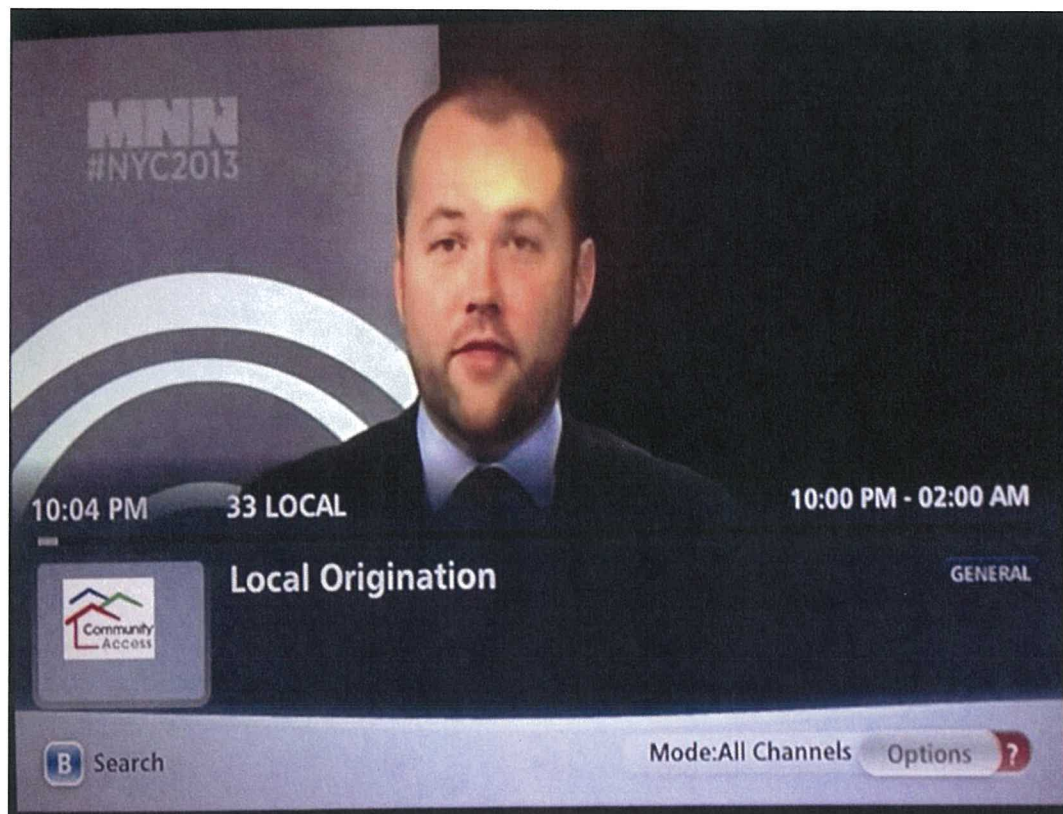
- Most of the local channels report that they carry some closed captioned programming but their MVPDs currently do not include any notation that any of their programming is closed captioned. CreaTV in San Jose, California cablecasts 328 of its 494 programs with closed captions.
- A number of the local channels report that they carry programming produced by or of interest to persons with disabilities, but no information about these programs appears on their MVPDs’ video programming guides:
 - BCTV operates two channels in the Brattleboro, Vermont area, a community without a commercial broadcast station, making it the only local presence on the cable line up. Brattleboro has a higher than average percentage of the population with auditory disabilities, as it is home to the Vermont Center for the Deaf and Hard

of Hearing which includes the Austine School for the Deaf. It cablecasts live Brattleboro Selectboard meetings with American Sign Language interpretation, as well as daily closed captioned programming.

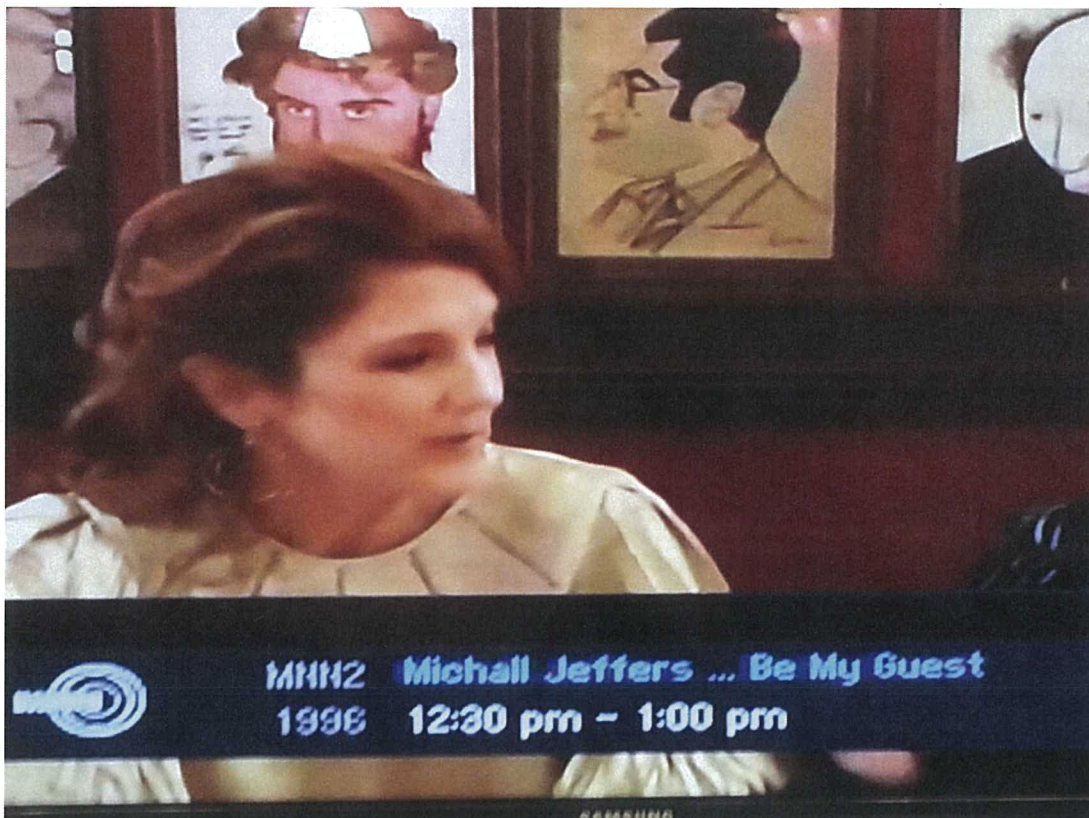
- FCTV in Falmouth, Massachusetts provides town meeting coverage that includes a sign language interpreter.
- Chicago Access Corporation (CAN-TV) has for the past 14 years carried a locally produced and closed captioned disability rights program called "ADAPT." This local, original television program was created by a group of Chicago residents who are themselves disabled, including the ADAPT program technical director who is legally blind. CAN-TV also carries Chicagoland Radio Information Service (CRIS Radio) in which volunteers read from local news sources to provide information for the visually impaired.
- AFTV in Framingham, Massachusetts carries the Talking Information Center Reading Service for the visually impaired.
- Pittsfield Community Television (PCTV) in western Massachusetts produces a program called "AD-Lib" that promotes independent living with disabilities and also simulcasts programming with the Radio for the Blind local broadcast station.
- CTN serving Ann Arbor, Michigan and neighboring communities cablecasts over 200 live meetings each year, including the monthly Disabilities Issue Commission meeting.
- WHCTV of West Hartford, Connecticut cablecasts a number of locally produced programs featuring persons with disabilities, including "Mr. Pops Neighborhood" (a youth program produced by a blind reverend) and "Be The Media" (a camera embedded at the American School for the Deaf for the production of school stories). It also cablecasts a collaborative work-study program with the Intensive Education Program, a local school that enables New England students with autism and developmental and physical impairments become responsible and productive citizens), and a program series by the West Hartford Advisory Commission for Persons with Disabilities intended to assist with emergency preparedness and how to vote.
- CCTV in Salem, Oregon reports that the city is the largest state capital in the country with no local broadcast TV affiliate, and CCTV was founded 24 years ago to provide local television coverage.

Attachment 3

VERIZON



TIME WARNER CABLE OF NYC



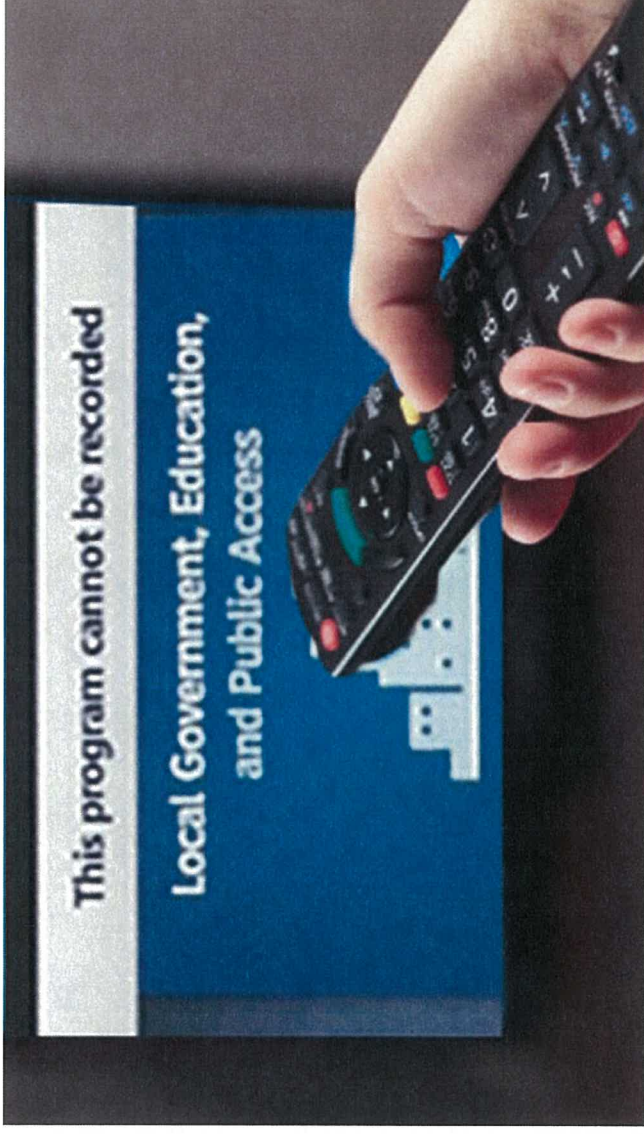
Attachment 4



Problems with AT&T's U-verse PEG Product

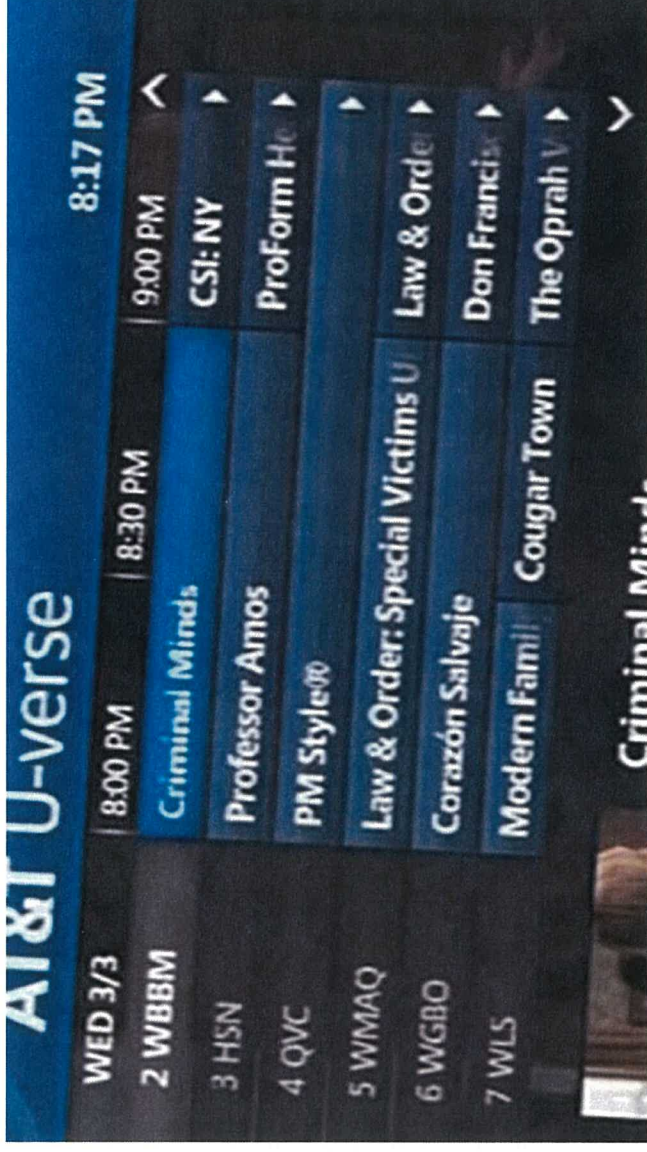
keepusconnected.org

The Problem:



AT&T segregates public, educational and government (PEG) on U-Verse into an inferior format without basic functionality viewers have come to expect.

Where's My Channel?



The AT&T program guide lists hundreds of channels but no local PEG channels.

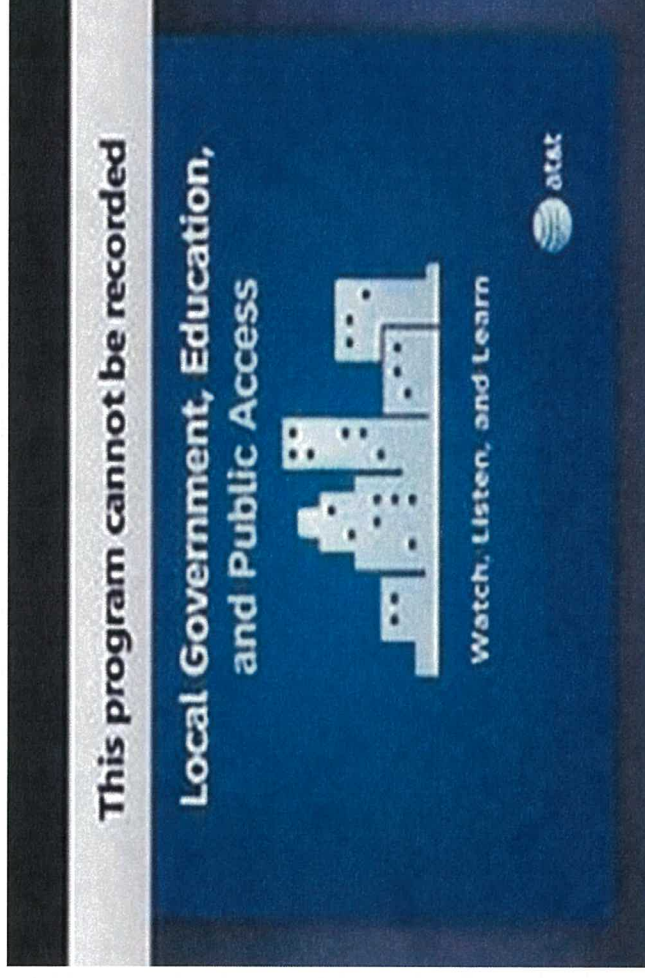
This deprives viewers of access to local information on public safety, jobs, health care, and more.

Why Can't I Find It?



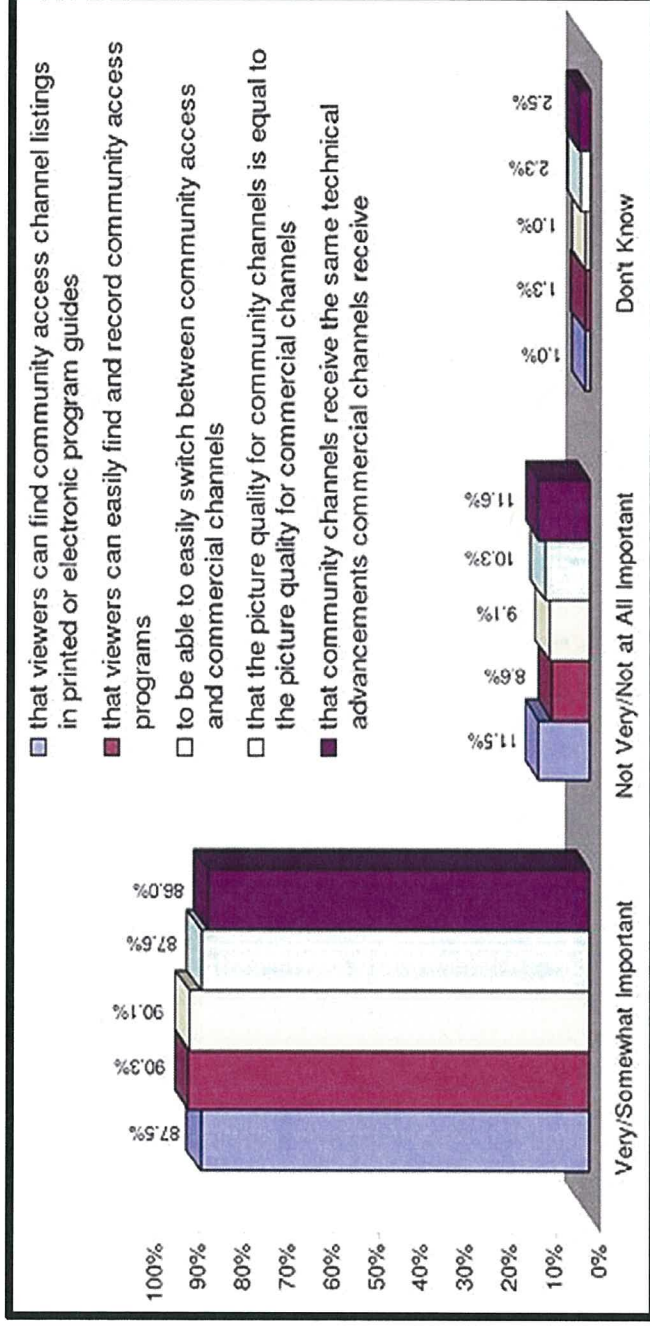
PEG channels are hidden, and viewers *must* navigate multiple visual prompts to find them. This disadvantages all viewers, particularly those with disabilities.

Why Can't I Record It?



This is what viewers will see if they try to record a local PEG program on U-verse.

What Do Viewers Want?



AT&T's Channel 99 U-verse PEG product fails to deliver what cable viewers expect.

Sources:



What's the relevance to Docket 12-108?

**The absence of PEG program listings on
electronic program guides
discriminates against people with
disabilities. See a real-time video
demo at www.KeepUsConnected.org**

What's Needed?

Act definitively in Docket 12-108
to prevent discrimination.

**Require that AT&T remove barriers
imposed on people with disabilities
seeking access to on-screen text menus
and guides for local PEG programming.**

What's the Solution?

The FCC has failed to act for far too long in Docket 09-13.

Granting the *ACM et al* Petition will stop AT&T's continued segregation and inferior treatment of PEG channels, disadvantaging residents seeking local programming.



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